IN THE

Supreme Court of the United States

No. 74-440

October Term, 1974

ERNEST MALIZIA,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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J. JEFFREY WEISENFELD
On the Petition

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ernest Malizia, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, dated September 17, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit affirming the judgment of conviction is annexed hereto as Appendix "A".

JURISDICTION

The order of the Court of Appeals is dated September 17, 1974. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of the informant's fear of appellant; of petitioner's having been one of the subjects of "Operation Flanker"; and of petitioner's fingerprint record with the Bureau of Narcotics and Dangerous Drugs, require reversal of his conviction.

2. Whether the District Court's charge to the Jury that the case must be decided constituted prejudicial error.

3. Whether the Court erred when it permitted evidence of Malizia's flight as tending to show a guilty state of mind with respect to this particular offense.

RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 52(a) and (b):

(a) Harmless Error: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error: Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

STATEMENT OF THE CASE

The Record

The record of the Court of Appeals consists of all filed documents as well as the minutes of the trial and sentence.

The Facts

On February 14, 1974, petitioner was convicted, after a jury trial, of a violation of 21 U.S.C. §173 and 174. On March 19, 1974, petitioner was sentenced to a prison term

of ten (10) years (Motley, J.) (74 Cr. 750).

This conviction was affirmed by the United States Court of Appeals for the Second Circuit in an opinion dated September 17, 1974 (&4-1389).

The Trial

Prior to trial, a hearing was held on Petitioner's motion to determine whether the prosecution should be permitted to introduce evidence of Petitioner's flight. The motion was denied and the government introduced such evidence at trial.

The government charged that on February 17, 1970, Malizia sold cocaine to a government informer named Gerstenfeld.

The Government's Case

On February 16, 1970, Agent Leonard Vecchione met with Gerstenfeld and instructed him to complete his negotiations to purchase drugs from Malizia. (18)* On February 17, 1971, Vecchione had Agent James King take $16,500.00 and serialized it and prepare it for the sale (19). At about 6:00-6:30 p.m., Vecchione met with the rest of the surveillance team. He instructed them as to their various surveillance assignments (19). Vecchione and Edward Kayner then went to Park Place and Church Street and met with Gerstenfeld. The informant was searched for contraband and none was found (20).

The informant was then instructed to get into a cab driven by George Gross, a New York State Police officer (21). Gerstenfeld got into the cab. Vecchione gave the $16,500.00, in a brown paper bag, to Gross, with instructions to give it to Gerstenfeld when they arrived at the arranged location of the sale; Christine's Luncheonette

*References are to the typewritten transcript of trial.

on Pleasant Avenue in Manhattan (22). The cab then drove to Christine's (24). Vecchione and Kayner followed right behind (24). At about 9:15 P.M. they arrived in front of Christine's. The cab pulled up to the curb in front of the luncheonette and Gerstenfeld got out and went in. Vecchione and Kayner pulled up along side of the cab (160, 227-228) Gerstenfeld sat at the counter. Malizia was behind the counter (25-27, 204). Gerstenfeld handed Malizia a brown paper bag (25-27, 159, 258). Malizia had some money in his hand and appeared to be counting it (27, 160, 161). Malizia came out from behind the counter, lifted up Gerstenfeld's jacket and placed a package between Gerstenfeld's belt and the area of the small of his back and then pulled the jacket down (162). Gerstenfeld left Christine's and went to a pre-arranged location, where the package was taken from him. The package was found to contain cocaine (34, 167).

After the sale, Malizia left Christine's and went to 118th Street. A man who looked like Malizia placed a package in the trunk of a Pontiac which was registered to Rose Malizia, the sister-in-law of appellant (310, 319).

Over defense objection, there was further testimony that on February 24, 1971, as a part of a Bureau of Narcotics and Dangerous Drugs operation, entitled "Operation Flanker", John Malizia, petitioner's brother was arrested (168, 329). On February 24 and February 25, first attempts were made to arrest Ernest Malizia. Agents went to his home and spoke to his family. They returned several times but to no avail. A surveillance was placed on Malizia's home. A surveillance was also placed on Malizia's mother's home on Long Island. Malizia was never seen during this time (389-398).

There was no evidence that Malizia was ever informed that he was wanted by the government (399, 401).

In early December of 1971, Malizia was arrested in Rockland County on a traffic violation. When arrested, he showed a false identification in the name of John Conite. Malizia was taken to court and bail was set at $1,000.00. Malizia never returned to court, nor did he attempt to recover the car in which he had been riding (401-411, 414-416).

On December 18, 1973, Malizia was arrested. At the time of his arrest, he was carrying identification in the name of Harry Luppes (420-424).

Gerstenfeld was not called as a witness. Vecchione testified that efforts had been made to locate him, but they were unsuccessful (41-42). From the beginning, Gerstenfeld told Vecchione he would not testify against Malizia (67). Over strenuous objections, (42-46) Vecchione was permitted to testify that some months after this sale, he spoke to Gerstenfeld about testifying in this case. Gerstenfeld told him that "he would never testify because he was in fear of being killed" (46).

Edward Kayner testified that he checked the package of cocaine for fingerprints. From the innermost wrapping he retrieved a partial print. He took a fingerprint card of Ernest Malizia's which was kept at the Bureau of Narcotics and Dangerous Drugs and had it checked against the partial print. No fingerprint identification could, however, be made (266). This occurred on February 19, 1971 (377-378).

Defendant's Case

Harry Peters, the owner of Christine's at the time of the sale, stated that the agents could not have seen into his luncheonette because the window through which these observations were made was right in front of a grill and was always foggy and covered with grease (455).

Furthermore, no one, including Malizia, was ever allowed to be in the luncheonette in the absence of Mr. Peters of his wife (451). Other than the Peters, no one was ever allowed behind the counter (450-451).

Mrs. Peters corroborated the testimony of her husband (493-495).

REASONS FOR GRANTING THE WRIT

The issues raised in this case are of substantial importance to the effective administration of justice. There is no question that highly prejudicial evidence which was totally unnecessary to the case was admitted into evidence. This case raises serious questions about the admission of state of mind testimony under circumstances where it added nothing except prejudice to petitioner. Serious questions are also raised by the extention of the harmless error doctrine by the Court of Appeals below.

This case also raises the issue of whether a charge to the jury that the "case must be decided" denied petitioner a right to a hung jury and whether such a charge was coercive.

This case also raises serious questions relating to what constitutes "plain error" under Rule 52(b) F.R.C.P.

During this trial, the government introduced the testimony of Agent Vecchione who stated that the informant, Gerstenfeld, had told him that he would never testify against petitioner because he was afraid of being killed.[1] Defense counsel objected on hearsay grounds, but

1. Testimony of Leonard Vecchione:

Q. Did he tell you at that time what his state of mind was with respect to testifying and whether he would ever testify?

A. Yes, sir.

The informant said that he would never testify because he was in fear of being killed. (46)

was overruled. The issue was clearly presented to the court by defense counsel (44-45).

The government also introduced testimony that on February 24 and 25, 1971, appellant and his brothers were the subject of a government round-up entitled "Operation Flanker".[2] Again, this was over defense objection.

Finally, the government elicited testimony which referred to appellant's fingerprints being on file at the Bureau of Narcotics and Dangerous Drugs.[3] No objection was taken to this testimony.

Petitioner contends that each of the above by itself requires reversal. They are treated as one point because they supplement each other and the type of prejudice they wrought is similar.

The Informant's fears of Malizia

Gerstenfeld was not a witness during the trial. In order to ward off a defense argument based on this, the government offered testimony to explain Gerstenfeld's absence.

Judge Motley asked defense counsel if he intended to make an issue of Gerstenfeld's absence. Counsel replied that he would only raise it in the context of the government's general burden to prove guilt beyond a reasonable doubt. (45) Evidently, Judge Motley felt that

2. Testimony of George Gross (168) and Donald Pinto (329).

3. Testimony of Edward Kayner (266)
Q. Did you take comparison fingerprints with you?
A. I brought three cards with me from the Federal Bureau of Narcotics.
Q. Was among those cards Mr. Malizia?
A. Yes, sir.
and Testimony of James King (378)
A. Now, he got a partial print on 2C and at that time I turned it over to Investigator Kayner along with a fingerprint card of Ernest Malizia, to be brought to the New York State Police Laboratory for further comparison and identification.

counsel's answer indicated the need to allow the government to explain why Gerstenfeld was not produced at trial. The government then proceeded to elicit testimony to the effect that Gerstenfeld was not in custody, not in any way under the control of the government, and that efforts to locate him were unsuccessful. Not being satisfied with just this, the prosecution asked the following:

> Q. Did he tell you at that time what his state of mind was with respect to testifying and whether he would ever testify?
>
> A. Yes, sir. The informant said that he would never testify because he was in fear of being killed. (46)

A vigorous objection[4] by counsel was overruled on the grounds that this testimony was not hearsay, since it went only to the state of mind of the missing informant and that its probative value outweighed its prejudice to Malizia.

Even if the characterization of this as an exception to the hearsay rule is correct, it was still error to admit it into evidence.[5]

This presents a clear example of prejudice far outweighing any probative value. The testimony that Gerstenfeld was afraid of being killed was entirely unnecessary for the purpose used. No party is required to produce a witness which it cannot find. 2 Wigmore on Evidence, §286 (3d Ed. 1940); *Case v. New York Central Railroad Co.*, 329 F.2d 936 (2d Cir., 1964). It was proper

4. Defense counsel previously objected to this testimony when the government initially made its offer of proof to the court (42-45). This issue was clearly understood by the court. cf. *United States v. Garelle*, 438 F.2d 366, 372 n. 17 (2d Cir., 1970) cert. dismissed, 401 U.S. 907.

5. While petitioner contends that the testimony was hearsay, this is not the crucial issue on the case; rather, it is whether the prejudice to petitioner outweighed any probative value.

for the prosecution to show that it had attempted to find Gerstenfeld and failed. This effectively closed any argument based on his absence. *United States v. Young*, 463 F.2d 934, 939-40 (CADC, 1972); *Wynn v. United States*, 397 F.2d 621, 625 (CADC, 1967), 2 Wigmore, supra, §286.

Surely, in light of the facts, appellant was not entitled to a "missing witness" charge.[6] *United States v. Craven*, 458 F.2d 802 (CADC, 1972); *United States v. Free*, 437 F.2d 631, 635-36 (CADC, 1970); *United States v. Dixon*, 469 F.2d 940, 942 n.4 (CADC, 1972); *United States v. Noah*, 475 F.2d 688, 691 (9th Cir., 1973); *United States v. Makekau*, 429 F.2d 1403, 1404 (9th Cir. 1970), cert. denied 400 U.S. 904. But, the government pressed on and went far beyond permissible limits. To have allowed this testimony was wrong. Wrong by any standard.

The state of mind of Gerstenfeld was virtually irrelevant to the issue of the failure of the government to call him. It was the fact that he was missing and that attempts to find him had been made which closed the issue. The operation of Gerstenfeld's mind added nothing except prejudice to Malizia. It was Gerstenfeld's unavailability and the fact that this was not in any way attributable to the government which were significant, not the state of mind which led to it. 2 Wigmore, supra §286; *Case v. New York Central Railroad Co.*, supra.

Vecchione's own testimony bears this out. As he put it, there are many times that a witness says he is unwilling to appear but this often changes.

The Court of Appeals in its opinion stated that this evidence was necessary because:

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6. None was ever requested.

> An adverse inference is likely to arise if a party fails to call a key witness who is expected to give favorable testimony to his cause. "It would present an anomaly in the law if, while one party may comment upon the absence of an opposing party's witness, . . . the opposing party were not permitted to introduce evidence to excuse the absence of such witness." *Schumacher v. United States*, 216 F.2d 780, 788 (8th Cir., 1954), cert. denied, 348 U.S. 951 (1955). On the other hand, such testimony predicated upon fear of retaliation, is so prejudicial that it should be excluded in the absence of exceptional circumstances.

This is not correct. In *United States v. Super*, 492 F2d 319, 321-23 (2d Cir. 1974) the Second Circuit dealt with a similar situation. In *Super*, the government could not locate an informant who would have been an important witness at trial. Testimony was given as to the unavailability of this witness and as to attempts to find him. There is no indication of any testimony as to why the witness was missing or about his state of mind. The trial court, upon this showing, charged the jury that the Government was not required to produce the witness and that no inferences for or against the defendants should be drawn by reason of the Government's failure to call him. The court stated:

> At the outset of the trial, Judge Judd indicated that if Lombardi were equally unavailable to both sides, the jury should not draw an inference one way or the other. A determination that he was equally unavailable was a finding he could properly make here. See *United States v. Bergman*, 354 F. 2d 931, 935 (2d Cir. 1966); *United States v. D'Angiolillo, supra*, 340 F2d at 457. Under all the

> circumstances, we find no reason to question the fact that Lombardi was in fact missing, that he was not under Government control and that his whereabouts were unknown. Therefore, the charge of Judge Judd that no inference might be drawn by the jury either for or against either party by virtue of Lombardi's absence was proper (Slip op. 1967-77)

It is clear, that here there was no necessity to go into the informant's state of mind. The appropriate procedure would have been for the government to request that a charge similar to that employed in *Super* be given.[7] On this record, such a request would have been well within Judge Motley's discretion to grant. Had she given such a charge it would have been proper and certainly upheld on appeal. The failure of the government to request the appropriate remedy can not be used to justify the use of an inappropriate one.

That this fear of being killed was not the result of a direct threat made to Gerstenfeld makes matters even worse. For by allowing this testimony in, the jury was clearly informed that appellant was the type of person who by general reputation alone, caused fear of death in those who opposed him. This is insidious. If a direct threat had been made, it could possibly be explained as momentary or caused by anger and not a true indication of the nature of the one who made the threat. Moreover, it would not imply a general reputation. Here, however, Ernest Malizia just by being Ernest Malizia was a threat to the safety of those who cross him. No more damning implication could be attributed to any accused. It is also likely that the jury, in

7. The Assistant United States Attorney advised the Court of the fact that Gerstenfeld was unavailable to both sides (p. 15 Minutes of the Proceedings on February 13, 1974, at 10:00 A.M.).

some way, attributed the threat to petitioner and this indicated his guilt.[8]

Petitioner's character was thereby made an issue even though he did not testify. That this testimony may, technically, have been an exception to hearsay, did not render its admission into evidence proper.

This is so for two reasons: first, as stated above, it placed appellant's character in issue when he chose not to testify; and second, the probative value was nil and the prejudice great. cf. *United States v. Pacelli*, 491 F.2d 1108 (2d Cir., 1974).

While this testimony was evidently sought to ward off defense arguments it was presented on the government's case-in-chief.

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecutor's case-in-chief. The state may not show defendant's prior trouble with the law. Specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probably perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny

8. The court never instructed the jury as to the limited purpose of this line of questioning.

> him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice (footnotes and citations omitted) *Michelson v. United States*, 335 U.S. 469 at 475-76 (1948).

United States v. Modern Reed & Rattan Co., Inc., 159 F.2d 656, 658 (2d Cir.,) cert. denied 331 U.S. 831 (1947); *United States v. James*, 208. F.2d 124 (2d Cir. 1953); See, *United States v. Smith*, 283 F.2d 760, 763 (2d Cir., 1960), cert. denied 365 U.S. 851 (1961).

> . . . the search for the truth should be the lodestone. Now in this search there are of course areas of irrelevancy where matter is kept from the jury because the danger of prejudice exceeds its probative force. *United States v. Apuzzo*, 245 F.2d 416 at 421 (2d Cir.) (en Banc), cert. denied, 355 V.S. 831 (1957)

See, *United States v. Harrington*, 490 F.2d 487, 490 (2d Cir., 1973). *U.S. v. Knoll*, 379 Fed. 427 (2d Cir. 1967) cert. denied 389 U.S. 973.

This is exactly the situation we have here. The state of mind of Gerstenfeld was, despite Judge Motley's assertion to the contrary, irrelevant to the issue of whether any inferences could be drawn from Gerstenfeld's absence.

That this evidence was not directly offered as bearing on guilt or innocence in no way diminishes its impact. It is hard to believe that the prosecution was unaware of the added benefit of this testimony.

In analogous areas, the courts have been extremely careful to keep from the jury any evidence which would

reflect on the character or reputation of a defendant. This has been so even where there is probative evidence involved. Cases involving photographs or fingerprints used for identification demonstrate this. Even when important to the government's case such items must be utilized in a manner which does not imply or inform the jury of the defendant's bad character. e.g., *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973); *United States v. Tomaiolo*, 249 F.2d 683 (2d Cir., 1957); *Leigh v. United States*, 308 F.2d 345 (CADC, 1962).

Revealing a past criminal record is only one way this can be done. The principle set down in *Michelson* is not and should not be limited to this alone. This testimony was unnecessary, objected to, and highly prejudicial. On this alone a reversal is required.

It is true that defense counsel went over this area on cross-examination, but this was clearly to try to overcome the harm already done. This cannot be considered as nullifying the error or rendering it less prejudicial. See, *United States v. Modern Reed & Rattan Co., Inc.*, supra, at 658.

It should also be pointed out that despite the "window dressing", this case was not one of overwhelming proof of guilt. In truth, it turned entirely on credibility. Vecchione, Gross and Kayner testified that they looked into the luncheonette and saw various portions of a transaction between Gerstenfeld and Malizia. The Peterson's, testifying for the defense, stated that this could not have occurred as testified to by the agents.[9]

There were no photos, no tapes, no fingerprints, nothing but the word of the agents. While the absence of such

9. The jury during its deliberation requested Mr. Peterson's testimony (599).

evidence may have been explained, this does not raise the level of proof. That level was hardly overwhelming.

The Court of Appeals seems to have predicated its decision in part on the harmless error doctrine. This doctrine is inapplicable. Here all the evidence was testimony of various members of the surveillance team. None of those cases where "overwhelming proof of guilt" was found predicate such a finding on evidence from a single source. To be overwhelming, evidence must be from several sources (e.g. civilian witnesses, policemen, co-conspirators, a defendant's own admissions) to find overwhelming evidence of guilt from the mere fact that several agents testified would be a return to the most primitive and literal approach to the "weight of evidence." See, *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1960)

From any viewpoint, appellant was severely prejudiced and should be granted a new trial free from such taint.

Operation Flanker

This was not all the prejudicial evidence of this nature erroneously allowed into evidence. Over objection, the prosecution was permitted to elicit testimony to the effect that appellant was the target of "Operation Flanker". Again the use of this was totally unnecessary. There was no need to inform the jury of this. Its only purpose was to stress the significance of appellant's criminal acts. That the government chose to title this operation is not evidence. It does not prove anything. Yet a juror hearing this could believe only that this was a big case involving important criminals.[10] It was, of course, used to establish the government's characterization of Malizia and his activities.

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10. This was reinforced by Judge Motley's repeated references in the charge to possession by appellant of a large quantity of drugs (587, 589, 590).

This use was improper. Again Malizia's character was called into question. The reasoning and cases cited previously apply to this testimony as well. See, *United States v. Brown;* 451 F.2d 1231, 1235 (5th Cir., 1971); *United States v. Marrero,* 486 F.2d 622, 625-27 (7th Cir., 1973).

Malizia's Fingerprints

In attempting to prevent Malizia from deriving any benefit from the absence of fingerprints on the contraband, the government showed through the testimony of Kayner and King that it had checked for fingerprints and found no readable ones. This was all that was required to spike any defense argument. But, this did not satisfy the government. The jury was told, on two separate occasions, that Malizia's prints were taken to be checked against a partial print found on the innermost bag in which the narcotics were found. Kayner stated that these prints were taken from thsoe on file at the Bureau of Narcotics and Dangerous Drugs. Thereby, unmistakeably intimating prior criminal conduct on the part of Malizia. Again, this was totally unnecessary. This was not an identification of Malizia by his fingerprints. The prints were used only to show the reason why there was no fingerprint evidence at trial. It would have been sufficient to prove that tests were run and that no readable prints were found. To tell the jury that Malizia had fingerprints on file at the Bureau of Narcotics and Dangerous Drugs, only prejudiced Malizia cf. *United States v. Kaufman,* 453 F.2d 306, 311 (2d Cir. 1971).

To this, no objection was taken. Even if one had been taken, the effect of the testimony would not have been diminished. Petitioner contends this was plain error.

As pointed out previously:

> If, at his trial, a defendant does not take the witness stand in his own defense, or if he has not

> himself been responsible for causing the jury to be informed about his previous convictions, he is entitled to have the existence of any prior criminal record concealed from the jury. The defendant's right to this protection is so well understood that discussion of it is unnecessary. *United States v. Harrington*, 490 F.2d 487 at 490 (2d Cir., 1973).

There are two basic types of factual patterns which raise this issue: Namely, where there is direct evidence of previous convictions or where the previous conflicts with the law are inferred from other evidence.

Cases dealing with the first type are only helpful in stating the general right of a defendant to be tried by a jury untainted by such evidence.

It is the second type of case which is pertinent here. Most of these cases themselves fall into three categories. One, "mug shots" or photographs; two, fingerprints; and three, prior imprisonment of the defendant.

"Mug shot" cases are factually the least applicable here, but because they are the most common, some discussion is required.

The problem usually arises, as it did in *United States v. Harrington, supra*, where a photograph is used to assist an in-court identification. Normally, this would present no problem. The difficulty arises where a "mug shot" is used. No inference of prior criminality arises from a mere photograph of a defendant being in the possession of the government. The possible sources for a photograph are unlimited and one would not usually associate possession by the government of one's photograph with a criminal record. See, *United States v. Dichiarinte*, 385 F.2d 333, 337 (7th Cir. 1967), cert. denied sub nom., *Mastro v. United States*, 390 U.S. 945 (1968).

There are times, however, when:

> . . . the introduction of photographs of a defendant may well be equivalent to the introduction of direct evidence of a prior criminal conviction . . . and so deprived the defendant of his right to a fair trial. *United States v. Harrington, supra,* at 490.

e.g. *Barnes v. United States,* 365 F.2d 509, 510 (D.C. Cir., 1966) (involving a typical "mug shot" with the numbers covered by adhesive tape and writing on the back covered with paper); *United States v. Reed,* 376 F.2d 226 (7th Cir., 1967) ("mug shots" described as "photographs of former inmates of state prison."); *United States v. Harmon,* 349 F.2d 316, 320 (4th Cir., 1965); *United States v. Harrington, supra,* (incompetently masked "mug shot").

In *Harrington,* this court, after reviewing the above cases, formulated three prerequisites to the introduction of "mug shot" type photographs:

> 1. The government must have a demonstrable need to introduce the photographs; and
>
> 2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
>
> 3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. 490 F2d at 494

This analysis is equally applicable to the use of fingerprints or to testimony about their use.

Those cases dealing with references to prior imprisonment almost always hold such references to be prejudicial error. The reason is that the inference of prior criminality is unavoidable. e.g. *United States v. Tomaiolo,*

249 F.2d 683 (2d Cir., 1957); *United States v. Gray*, 468 F.2d 257 (3d Cir., 1972); *United States v. White*, 355 F.2d 909 (7th Cir., 1966).

The usual use of fingerprint cards, etc., is to identify the defendant as the perpetrator of a crime. For this purpose, such evidence has been consistently upheld. *Moon v. State*, 198 P. 288 (Ariz. Sup. Ct., 1921); *State v. Viola*, 82 N.E. 2d 306 (Ct. App. Ohio, 1947) app. dismd., 86 N.E. 2d 715, cert. denied 334 U.S. 816; *State v. Jackson*, 200 S.E. 2d 626 (Sup. Ct. N.C., 1973).

These cases, like *Harrington*, require that there be a valid purpose for such evidence and it must not imply prior criminal conduct. *State v. Jackson, supra*, at 633.

Turning to this case, it is obvious that the requirements set down in *Harrington* and which should apply here, have not been met.

First, there was no demonstrable need to say anything about Malizia's prints or from where they were obtained and second, the existence of such fingerprints and that they were filed with the Bureau of Narcotics and Dangerous Drugs clearly implied a criminal record. The first ground has previously been covered, the second, requires further discussion.

Fingerprint cards are different from photographs as far as the implication of prior criminality. Photographs can be obtained through non-governmental sources and are readily available. Fingerprints imply governmental action of some sort. Ordinary people do not take fingerprints, they do take photographs. Thus, the jury knowing Malizia had a fingerprint record must necessarily have known that they were taken by some governmental agency. They were informed that the agency which possessed them was the Bureau of Narcotics and Dangerous Drugs; to assume they

did not reach from this fact any inference of prior criminality is ludicrous. The admission of this evidence was error.

This was not a situation where the jury could have believed the prints came from the instant arrest, since the government clearly showed that Malizia was arrested long after his fingerprints were used by Kayner (February 19, 1971). See *United States v. Calarco*, 424 F.2d 657 (2d Cir.,), cert. denied, 400 U.S. 834 (1970). The same is so for the arrest on the traffic violation in Rockland County.

Nor was the testimony inadvertant, *Mikus v. United States*, 433 F.2d 719 (2d Cir., 1970); *Parker v. United States*, 404 F.2d 1193 (9th Cir., 1968), cert. denied 394 U.S. 1004, reh. denied 395 U.S. 941, or unresponsive, *United States v. Sidman*, 470 F.2d 1158 (9th Cir., 1972), cert. denied 93 S. Ct. 948 (1973). It was brought out by the prosecution, *United States v. Stromberg*, 268 F.2d 256 (2d Cir. 1959), cert. denied sub nom., *Lessa v. United States*, 361 U.S. 863, which was not merely responding to a defense trial tactic. *United States v. Borkenhagen*, 468 F.2d 43 (7th Cir., 1972), cert. denied 410 U.S. 934. Nor did defense counsel "open the door". *United States v. Iannelli*, 477 F.2d 999 (3d Cir., 1973), U.S. App. Pndg.

The crucial question then becomes: Was this plain error?[11] Petitioner claims that it was. The primary considerations are, the nature of the right injured by the error and whether bringing it to the court's attention could have cured it, either by striking or by curative instructions.

There can be no question that the right involved is an important one. *United States v. Harrington*, 490 F.2d 487

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11. Federal Rules of Criminal Procedure, Rule 52(b).

(2d Cir., 1973); cf. *Marshall v. United States,* 360 U.S. 310 (1959).

It is also clear, that nothing could have been gained if Judge Motley had been apprised. To strike the testimony would have done nothing.

As to the effect of curative instructions:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers known to be an unmitigated fiction . . . (footnotes omitted) *Krulewitch v. United States,* 336 U.S. 440 at 453 (1949) (concurring opinion of Jackson, J.)

Bruton v. United States, 391 U.S. 123 (1968); *United States v. Clarke,* 343 F.2d 90 (3d Cir., 1965); *United States v. Nemeth,* 430 F.2d 704, 706 (6th Cir., 1970); *United States v. Rudolph,* 403 F.2d 805, 807 (6th Cir., 1968); *Maestas v. United States,* 341 F.2d 493, 495-96 (10th Cir., 1965); *Mora v. United States,* 190 F.2d 749, 752-53 (5th Cir., 1951). See *U.S. v. Rinaldi,* 301 F.2d 576 578 (2d Cir. 1962); *United States v. Rivera* — F 2d — (2d Cir. slip op. 2591, 5/17/74).

Petitioner does not assert that curative instructions have no validity, only that they are a limited tool. There was nothing Judge Motley could have said to soften the effect of this evidence on the minds of the jurors.[12] In fact, further comment may just have made matters worse. For these reasons, the introduction of the testimony concerning Malizia's prints was plain error. See, *United States v.*

12. Certainly, Judge Motley's fingerprints are not on file with the Bureau of Narcotics and Dangerous Drugs. See, *United States v. Robinson,* 406 F.2d 64, 64-65 (7th Cir., 1969), cert. denied 395 U.S. 926.

Gray, 468 F.2d 257, 261 (3d Cir., 1972).

In conclusion, we should not lose sight of the cumulative effect of the foregoing on the jury. [13] Without resort to any evidence pertaining to guilt or innocence, the jury knew that Malizia was a man to be feared, with aireputation as a killer; that he had prior conflicts with the Bureau of Narcotics and Dangerous Drugs, which necessarily involved drugs; and that he was thought of by the government as an important criminal.

This was hardly conducive to a fair appraisal by the jury of Malizia's guilt[14] and requires that he be granted a new trial.

2. In her original instructions to the Jury, the trial judge stated:

> Now, the logical result of that application (of the law, as stated in the instructions, to the facts) certainly is a verdict in the case. As we have already pointed out, . . . this is an important case to both the government and defendant, and therefore since it is an important case, it must be decided. (573-574)

13. Agent Vecchione testified that on February 6, 1971 he instructed Gerstenfeld to "complete negotiations for the purchase of 1 kilogram of cocaine on the following day from either Mr. Ernest Malizia or Mr. Josepm Malizia." (18) This was objected to as hearsay, which it was. Some background hearsay may be necessary but the portion of this testimony which identified the prospective sellers was not needed. It would have been sufficient to state that instructions to complete a transaction were given. The identity of those involved should have been established by competent, non-hearsay testimony alone. The prejudice from this is not as great as that arising from the other evidence discussed above Petitioner, however, contends it was erroneous to admit this testimony and wishes to call it to the court's attention.

14. It should also be noted that a charge on reasonable doubt almost identical to that given here was characterized by the Second Circuit as incomplete. *United States v. Barrera*, 486 F.2d 333, 339-40; 339 n.2 (2d Cir., 1973).

Later in the charge, the judge advised the Jury:

> As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of your fellow jurors as well as to ask for an opportunity to express your own views. No one juror holds the center stage in the jury room and no one juror controls or monopolizes the deliberations.
>
> If after listening to your fellow jurors and if after stating your own view you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of your opinion to change your view, if you become convinced your original view was wrong.
>
> On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you are outnumbered.
>
> Now, because this is a federal court, your verdict in this case must be unanimous. It must reflect the conscientious conviction of each and every one of you. (594-95)

After the entire charge, defense counsel specifically objected to that portion of the charge which told the Jury that the "case must be decided." (595). The Court, however, ignored the objection. The case was then given to the Jury. The time was 9:20 P.M., and it was a Friday night preceding a holiday weekend (Washington's Birthday). At 11:22 P.M. the Jury returned with its verdict of guilty.

The language set out above constituted an *Allen*[15]-like charge and will be referred to as such in the brief. The language used and the setting in which it was given render it a clearly coercive charge requiring reversal.

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15. *Allen v. United States*, 164 U.S. 492 (1896).

The history of the *Allen* charge is replete with judicial criticism. Its use has been approved only grudgingly, with deep reservations, and in limited circumstances.

The use of this type of charge in this case presents a somewhat novel variation. It is also somewhat surprising that after so much has been written on the subject this language would still be used.

The areas of inquiry in this case are:

1) Were the statements that "the logical result . . . certainly is a verdict in this case", and that the "case must be decided", coercive per se?;

2) Was this coerciveness mitigated by any other portions of the charge? and

3) Were these statements coercive in the setting in which they were made?

It is appellant's claim that the charge was coercive both on its face and as applied, and that nothing said by Judge Motley mitigated that effect.

This area of law is a familiar one and there have been numerous cases in all jurisdictions dealing with it.

The basic argument surrounding the *Allen* charge is whether it is legitimate guidance or coercive interference.

The coercive elements which the *Allen*- type charge may produce may be either substantive or circumstantial. Substantive coercion occurs when the language of the charge itself is coercive. Where it contains a misstatement of fact or a statement that the Court has no authority to make, regardless of how a Jury might react. Am. Crim. L.R. 10; 637, 655-56 (Spring, 1972). Circumstantial coercion relates primarily to the particular setting and circumstances in which such a charge is given.

In this case both elements are present.

Substantive Coercion

Judge Motley's charge informed the Jury that this was an important case and that because it was important, it had to be decided. This was erroneous. *Jenkins v. United States*, 380 U.S. 445 (1965); *United States v. Bailey*, 468 F.2d 652, 663 (5th Cir., 1972); *United States v. Harris*, 391 F.2d 348, 355 (6th Cir., 1968) cert. denied 393 U.S. 874.

While a Jury need not be informed that it can properly be unable to reach a decision, such a result is part of our system of criminal justice. cf. *United States v. Bowles*, 428 F.2d 592, 596 (2d Cir., 1970), cert. denied 400 U.S. 928. The requirement of impartiality, unanimity, and the reasonable doubt standard require that an accused be entitled to a hung jury. A verdict of guilty is not possible unless each of the twelve jurors is convinced in his own mind of guilt beyond a reasonable doubt. Implicit in this is the right to a hung jury. If all twelve jurors cannot agree, the jury must return a verdict of undecided. *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir.,) cert. denied 396 U.S. 837 (1969); *Thaggard v. United States*, 354 F.2d 735, 739-41 (5th Cir. 1965) Coleman, J. concurring) cert. denied 383 U.S. 958; *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir., 1962) (Brown, J., dissenting), cert. denied, 370 U.S. 955 (1962).

In *Jenkins v. United States, supra*, the judge informed the jury, "You have got to reach a decision in this case." This charge was a misstatement of the law and was, under the circumstances of that case, held by the Supreme Court to be coercive. See, *Powell v. United States*, 297 F.2d 318, 320 (5th Cir., 1961) ("You ought to be able to reach a verdict"). At the very least it was an incorrect statement of the law, a statement which told the jury they must do something that was not, in fact, required.

Here, the charge was even more improper because it

said, without explanation, that the importance of the case demanded a verdict. The clear implication was that the case was an especially important one to the government; with all the speculation to which such a possibility gives rise. The attempt to balance this element by stating that the case was also important to defendant failed, because every criminal case is important to an accused. The same cannot, in the same sense, be said about the government.[16] By stressing this element the court only reinforced the coercion to reach a verdict. Furthermore, Judge Motley told the jury that the logical conclusion of their deliberation was for the case to be decided. This clearly informed the jury that any failure to reach a verdict would be not only improper, but illogical as well. It is difficult to conceive of a more prejudicial misstatement as to the role of the jury in attempting to reach a decision. See *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (dissenting opinion), cert. denied 370 U.S. 955 (1962); *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir., 1971); *Thaggard v. United States*, 354 F.2d 735, 740 (5th Cir. 1965) (concurring opinion); *Green v. United States*, 309 F.2d 852, 856 (5th Cir. 1962); *United States v. Bowles*, 428 F.2d 592, 596 (2d Cir. 1970) cert. denied 400 U.S. 928 (1970) *Rice v. United States*, 356 F.2d 709, 717 (8th Cir. 1966); *United States v. Davidson*, 367 F.2d 60, 65 (6th Cir. 1966); cf. *Jenkins v. United States*, 380 U.S. 445 (1965).

In this case, Judge Motley's admonishment that the case must be decided was given in the original charge.

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16. This could have been clarified had the Judge explained that the importance to the government was a general one, in seeing justice done, rather than relating specifically to the charges against Malizia. e.g. *United States v. Hynes*, 424 F.2d 754, 756-757 n.2 (2d Cir. 1970) cert. denied 399 U.S. 933. Moreover, the facts before the jury reinforced this "importance". The jury knew of operation "Flanker" and that Malizia was "big people" (68).

Several cases have held that an *Allen*- like charge is less likely to be prejudicial if given in the original instructions or prior to, rather than after, the Court being apprised that the jury cannot reach a verdict. e.g. *Nick v. United States*, 122 F.2d 660, 674 (8th Cir. 1941) cert. denied 314 U.S. 687; *Fulwood v. United States*, 369 F.2d 960 (CADC 1966) cert. denied 387 U.S. 934; *People v. Iverson*, 9 Ill. App. 3d 706, 292 N.E. 2d 908 (App. Ct., 2d Dis., 1973); *Kelly v. State*, 310 A.2d 538 (Md. Ct. App., 1973); See *United States v. Martinez*, 446 F.2d 718, 719 (2d Cir., 1972), cert. denied, 404 U.S. 944.

Those cases are distinguishable. In *Nick v. United States, supra*, the court was referring only to that portion of the *Allen* charge relating to the obligation of the minority to listen to the majority. In *Fulwood v. United States, supra*, at 962-963, the Instructions were to the effect that the jurors should keep an open mind and weigh the arguments of their peers. The charge also included a statement that the judge hoped the jury would be able to decide the matter. This was upheld since it was expressed as a hope. See *United States v. Johnson*, 432 F.2d 626, 632-633 (CADC., 1970) cert. denied 400 U.S. 949.

In *People v. Iverson, supra*, at 910-11, the court was clearly addressing itself to the, "heed the majority", portion of the *Allen* charge.

In *Kelly v. State, supra*, at 542, the charge was to the effect, ". . . you must decide whether or not you can reach a verdict in this case." as well as the general duty to listen to the other jurors.

See, *United States v. Marcey*, 440 F.2d 281, 286 N.27 (CADC., 1971); *Burroughs v. United States*, 365 F.2d 431, 434 (10th Cir., 1966); *Burrup v. United States*, 371 F.2d 556, 558 (10th Cir., 1967), cert. denied, 386 U.S. 1033.

It is arguable that that portion of the *Allen* charge which

instructs the jury to "heed the majority" has a greater coercive force when, in fact, there is a majority to heed. Whether this is correct is debatable since such a charge could dissuade a minority from ever forming. *Green v. United States, supra.*

The timing of the charge, however, merely diminishes the coercion, but does not eliminate the possibility. *People v. Iverson, supra,* at 911 n.2.

The determination of the above is not crucial to this case. Here, appellant complains of that portion of the charge directing the jury to return a verdict. As to this the timing is not significant. When a jury is told that they must reach a verdict, the impact is not only to coerce a minority out of its already held views, but clearly impedes the very formation of a minority view. *Green v. United States, supra* at 856. A juror faced with 10 or 11 jurors in agreement may well yield before he even forms an opinion. If the juror believes that a verdict must be reached, it is highly unlikely that he would assume that he could convince all the others to share his viewpoint. Requiring a verdict tends to strengthen the majority at the expense of the minority throughout the deliberations. Furthermore, here the verdict was reached only two hours after the charge so that it is unlikely that the effect of the charge dissipated.

The rest of the charge did not cure this coercion.

There have been numerous cases before this court where the potentially coercive effect of the *Allen* charge has been held to have been obviated by other language in the instructions. Such is not the situation presented here. At the end of the charge, Judge Motley told the jury:

> On the other hand, do not surrender your honest conviction *solely* because of the opinion of your fellow jurors or because you are out numbered.[17]

17. The use of the word "solely" implies there are times when an honest conviction should be surrendered.

> Now, because this is a federal court, your verdict in this case must be unanimous. It must reflect the conscientious conviction of each and every one of you. (emphasis supplied)

This is totally inadequate to mitigate the coercive effect of the earlier directive; that the case "must be decided".

> Such a charge, so long as it *makes plain* to the jury that each member of the jury has a duty conscientiously to adhere to his own honest opinion *and avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial,* . . . is still a permissible charge to be given in proper circumstances . . . (emphasis supplied). *Thaggard v. United States,* 354 F.2d 735, 739 (5th Cir. 1965) cert. denied, 383 U.S. 958.

The cases in the Second Circuit apply a similar standard to that set out in *Thaggard.*

This case presents a somewhat different situation than those previously dealt with by this court. Usually, the *Allen* charge is given in the appropriate (or a slight variation). The coercion alleged is implied and arises out of the general language (or the variation) of the *Allen* charge. This court has repeatedly held, under the above circumstances, that where the judge made it clear to the jury that none of them should yield his conscientious judgment, the charge was not coercive.

In relation to this case, the cases decided by the Second Circuit have in common two distinctions: first, in none of those cases was the language used nearly as coercive as that used here and, second, in all of those cases the language used to informhthe jury that they did not have to yield conscientiously held views was clearer and in almost all

instances much more thorough.[18]

See, *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962); *United States v. Kahaner*, 317 F.2d 459, 483-484 (2d Cir), cert. denied, sub nom *Corallo v. United States*, 375 U.S. 835 (1963); *United States v. Curcio*, 279 F.2d 681 (2d Cir.) cert. denied 364 U.S. 824 (1960); *United States v. Thomas*, 282 F.2d 191 (2d Cir. 1960); *United States v. Rao*, 394 F.2d 354, 356 (2d Cir. 1968) cert. denied 393 U.S. 845; *United States v. Kenner*, 410 F.2d 693, 696 (2d Cir. 1969), cert. denied 396 U.S. 835, reh. denied 396 U.S. 949; *United States v. Barash*, 412 F.2d 26, 31 n. 9 (2d Cir., 1969) cert. denied 396 U.S. 832; *United States v. Hynes*, 424 F.2d 754, 756 n.2 (2d Cir., 1970) cert. denied 399 U.S. 933; *United States v. Martinez*, 446 F.2d 118, 119 (2d Cir. 1971) cert. denied 404 U.S. 944; *United States v. Cassino*, 467 F.2d 610, 619, (2d Cir. 1972) cert. denied 410 U.S. 913, 928, 942; *United States v. Jennings*, 471 F.2d 1310, 1313 (2d Cir., 1973) cert. denied 411 U.S. 935; *United States v. Domenech*, 476 F.2d 1229, 1232 (2d Cir., 1973), cert. denied—U.S.—; *United States v. Tyers*, 487 F.2d 828, 832 (2d Cir., 1973); *United States v. Meyers*, 410 F.2d 693, 696 (2d Cir. 1969), cert. denied 396 U.S. 835; *United States v. Bowles*, 428 F.2d 592 (2d Cir., 1970) cert. denied 400 U.S. 928.

It is clear, from the foregoing cases, especially, *United States v. Bowles, supra*, that the charge in this case was coercive. It resulted in a forced verdict. The right to

18. Compare §5.4(a), ABA, *Standards Relating to Trial by Jury*, Instructions 8.11, Jury Instructions and Forms for Federal Criminal Cases 27 FRD. 39, 97-98 (1961); *United States v. Gordon*, 196 F.2d 886-891-2 (7th Cir.) rev'd. on other gds. 344 U.S. 414 (1952); *United States v. Barnhill*, 305 F.2d 164 (6th Cir.) cert. denied 371 U.S. 865; 1962; *Kawakita v. United States*, 190 F.2d 506 (9th Cir. 1951) aff'd 343 U.S. 717 (1952); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969) cert. denied 396 U.S. 1017; *United States v. Bailey*, 468 F.2d 652, 663 (5th Cir. 1972). See, note 14a, *supra*.

disagree which was found to be implicit in the language of the charge in *Bowles* was specifically removed from the jury by Judge Motley's instructions. This is a case where the jury was, indeed, ordered to reach a verdict.

This could so easily have been avoided. The issue was clearly presented to Judge Motley and she let the charge stand without even verbalizing her decision.

Circumstantial Coercion

When the Allen-type charge is viewed in the context of this case, the prejudice is even more readily apparent. Here, after the charge, defense counsel specifically objected. Yet, Judge Motley did nothing to diminish or correct the impact of her erroneous statement that the case had to be decided. It is hard, in retrospect, to understand her refusal to say anything further to the jury on this issue.

Moreover, this case was given to the jury at 9:20 P.M. on a Friday preceding a holiday weekend.[19] The jury which had been told they must reach a verdict and probably anxious to begin their holiday, was not a jury disposed to long deliberations. Since the case had to be decided, better sooner-thereby preserving the holiday—than later. This was not a case of overwhelming proof of guilt, but was in fact a case entirely based upon credibility. These factors elevated the coercion inherent in the charge to an even more intolerable level.

For these reasons, appellant contends that his Sixth Amendment right to a fair trial, his right to a unanimous jury verdict, his right to fair and impartial jury deliberations, and his right to have his guilt determined

19. Judge Motley's position that this was the fault of defense counsel is untenable. Even if court had not been adjourned an hour early on the day before, it still would not have made any significant difference on when the jury began its deliberation. Previously, Judge Motley showed no reluctance to having the case go over to Saturday (271).

beyond a reasonable doubt (as well as his right to the presumption of innocence) were all denied to him and that a reversal of his conviction is required.

3. On April 13, 1974, immediately preceding the trial, a hearing was held. During this hearing defense counsel apprised the court of his objections to the introduction of prosecution evidence tending to show that Malizia fled to avoid prosecution in this particular case. Judge Motley ruled in favor of the government. During trial, the government, over renewed objection of defense counsel, offered evidence that Malizia, after February 24, 1974, did not return home, that he used a false identification and jumped bail on a Rockland County traffic charge, and that when arrested on this case he was carrying false identification. This was error.

Here, the first attempt to arrest Malizia was made on February 24, 1971, a full week after the alleged sale. Moreover, no governmental official had informed Malizia prior to his arrest, that he was wanted or for what charge he was wanted.

The general rule is stated as:

> The intentional flight . . . of a defendant immediately after the commission of a crime, or after he is accused of a crime, that has been committed . . . may be considered by the jury . . . in determining guilt or innocence. 27 F.R.D. 58.

Bailey v. United States, 410 F.2d 1209, 1217 (10th Cir., 1969), cert. denied 396 U.S. 933.

For two reasons petitioner's pre-trial application should have been granted as to his activities after February 24, 1971. First, because he did not flee immediately after the commission of the crime and second, he was never

informed of the charge against him so that his flight cannot be used in connection with the commission of the particular offense in question.

Given the nature of the business in which it was alleged Malizia engaged, a week's time is not insignificant. There may have been numerous supervening events to have caused him to follow the course of conduct which he did. None of them may have related to this charge. Certainly, a week later is not "immediately". See, e.g. *Bailey v. United States*, 410 F.2d 1209, 1217 (10th Cir., 1969), cert. denied 396 U.S. 933 (Defendant fled two days after he had learned a friend had been arrested); *Shorter v. United States*, 412 F.2d 428 (9th Cir., 1969) cert. denied 396 U.S. 970 (Defendant fled immediately after F.B.I. agents who had a warrant for defendant identified themselves and stopped defendant's car).

Moreover, here, there was no evidence that Malizia had been informed that he was wanted or for what he was wanted. As stated in *United States v. Embree*, 320 F.2d 666, (9th Cir., 1963)

> Perhaps . . . flight tends circumstantially, to prove that he was guilty of some crime. But since there is nothing in the record to indicate that he was informed before his attempted flight, that he was being sought in connection with the offenses involved in this case, such flight does not constitute an admission, or other evidence, that he is guilty of those crimes. at 668

The Ninth Circuit made it clear in *Shorter v. United States, supra*, at 430 that it is not a requirement that the government prove that a defendant knew of the particular charge. It did, however, state that the evidence of flight in *Embree* did not have sufficient probative value to amount to an admission of guilt. Such is the case here.

It is not necessary to fix a mechanical rule as to the necessary prerequisite to the admission of evidence of flight. Flight, however, may not be a reliable indication of guilt, *Alberty v. United States,* 162 U.S. 499 (1896), and its propriety has been questioned. *Wong Sun v. United States,* 371 U.S. 471, 483 n.10 (1963); *United States v. Robinson,* 475 F.2d 376, 384 (CADC, 1973); *United States v. Telfaire,* 469 F.2d 552 (CADC, 1973).

In light of the above and because flight may impress a jury[20] beyond its true value, this court should not permit its introduction where the basis is as tenuous as that presented here. Especially, as here, where the entire case turned on credibility.

For these reasons petitioner contends that the introduction of the evidence of his flight requires a reversal of his conviction.

CONCLUSION

FOR THE REASONS STATED ABOVE THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

DAVID BREITBART
Attorney for Petitioner

J. JEFFREY WEISENFELD
On the Petition

20. Especially as here, where there was so much evidence pertaining to flight. That the flight itself was clearly proved has no effect on the degree of proof relating to the cause of that flight.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1132—September Term, 1973.

(Argued June 18, 1974 Decided September 17, 1974.)

Docket No. 74-1389

UNITED STATES OF AMERICA,

Appellee,

v.

ERNEST MALIZIA,

Defendant-Appellant.

Before:

SMITH and MANSFIELD, *Circuit Judges,*
and BARTELS,* *District Judge.*

Appeal from a judgment of conviction after a jury trial in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge,* for the sale of narcotics in violation of 21 U.S.C. §§173, 174.

Affirmed.

J. JEFFREY WEISENFELD, New York, N.Y. (Goldberger, Feldman & Breitbart, New York, N.Y., on the brief), *for Appellant.*

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* Of the Eastern District of New York, sitting by designation.

BANCROFT LITTLEFIELD, JR., Asst. U.S. Attorney (Paul J. Curran, U.S. Attorney for the Southern District of New York, S. Andrew Schaffer, Asst. U.S. Attorney, of counsel), *for Appellee.*

BARTELS, *District Judge:*

After a three-day trial in the Southern District of New York before Constance Baker Motley, *District Judge*, and a jury, Ernest Malizia was convicted on February 15, 1974, of one-count indictment which charged him with the sale of 995 grams of cocaine in violation of 21 U.S.C. §§173 and 174. He was sentenced to ten years imprisonment and a $20,000 fine.

On appeal Malizia raises several errors, the most important of which was the admission of testimony that informant Stanley Gerstenfeld stated that he would not testify because of fear of death, and that Malizia's fingerprints were taken from the files in the office of the Bureau of Narcotics and Dangerous Drugs.

The record reveals that at about 6 P.M. on February 17, 1971, Group Supervisor Leonard Vecchione of the Federal Bureau of Narcotics and Dangerous Drugs (B.N.D.D.) and Investigator Edward Kayner of the New York State Police proceeded to the area of Park Place and Church Street where they met with Stanley Gerstenfeld, the Government's informant, whom they instructed to enter an undercover taxicab driven by State Police Investigator George Gross, to whom Vecchione then delivered a paper bag containing $16,500 in advanced Government funds. Gross and Gerstenfeld proceeded in the taxicab to Christine's Luncheonette at 349 Pleasant Avenue in Manhattan, followed by Vecchione and Kayner in an unmarked police

vehicle and by B.N.D.D. Agent John Maltz in a second vehicle.

At approximately 9:15 P.M. they arrived in front of Christine's Luncheonette, whereupon Gross handed Gerstenfeld the paper bag containing the $16,500 and Gerstenfeld then exited the cab and entered Christine's. The luncheonette was located below the level of the sidewalk and was enclosed by two large glass windows on both sides of a glass door. A serving counter ran from front to back, perpendicular to the street. Gerstenfeld entered the luncheonette and delivered the bag of money to Malizia who was standing alone behind the counter. Malizia then removed the money from the bag and after thumbing through the bills, came from behind the counter, lifted up the back of Gerstenfeld's three-quarter length leather jacket and stuck a yellowish package inside Gerstenfeld's belt in the small of his back and pulled the jacket down over the package. Gross observed the entire transaction from his taxicab and Vecchione and Kayner who stopped momentarily also witnessed Malizia counting the money. After the sale Gerstenfeld hailed a passing cab which took him to 86th Street and York Avenue where he transferred to Investigator Gross' cab. Gross then drove Gerstenfeld to 89th Street and York Avenue where they met Vecchione and Gerstenfeld delivered to Vecchione the yellowish package, which upon analysis contained 995 grams of cocaine. Ten minutes after Gerstenfeld's departure, Malizia was observed leaving Christine's and proceeding to 118th Street and Pleasant Avenue where he placed a brown paper bag in the trunk of a blue Pontiac registered in the name of Rose Malizia, his sister-in-law.

One week later, on February 24, 1971, agents attempted unsuccessfully to locate and arrest Malizia in New York City and also at his house in Nanuet, New York. They interviewed Malizia's wife and children concerning his

whereabouts but without success. They maintained surveillance at Malizia's home on a regular basis for the next two years and also on the homes of his relatives during Christmas and Thanksgiving, all without success.

Malizia was not arrested until December 18, 1973, when he was apprehended in the vicinity of 236th Street and Johnson Avenue in the Bronx, after he had given the false name of Harry Luppes, which was the name on a driver's license found in his possession. This was the second time Malizia had given false identification while he was being sought; the first being when he was arrested for a traffic violation in Rockland County on December 5, 1971. At that time he claimed he was John Conite, the name on a forged driver's license then held by him.

I

We turn first to the most troublesome issue concerning the admission of testimony relative to the state of mind of Stanley Gerstenfeld. Ordinarily one of the most important witnesses called by the Government in a narcotics case is the purchaser. Here the purchaser was not a Government agent but the informant Gerstenfeld, who from the beginning indicated to the Government agents that he would not testify. Nevertheless an exhaustive search was made by the Government for Gerstenfeld without success. After testimony of the search was adduced, the Government stopped and approached the bench for a conference relative to its offer of proof to show that Gerstenfeld had told Vecchione that he would never testify because he was in fear of being killed. Realizing the importance of the testimony of the informant in this case and at the same time the prejudicial effect of the informant's stated reason for failing to appear, Judge Motley, outside of the jury's presence, indicated to the defendant's counsel that if he did not intend to comment adversely on the Govern-

ment's failure to produce the informant, the testimony as to the reason for the failure of the witness to appear would be excluded. Instead of accepting this suggestion, counsel replied that he would raise the question in his summation in the context of the Government's failure to sustain "its burden of producing all witnesses." Only after defendant's rejection of the suggestion did Judge Motley allow the Government to explain why Gerstenfeld was not produced at the trial[1] on the premise that the probative value of the testimony was sufficient to outweigh its prejudicial effect. "Informants in drug cases are not Brahmins, nor are they noted for long-term occupancy of well-tended premises. Their disappearance, voluntary or otherwise, is not extraordinary." *United States* v. *Super*, 492 F.2d 319, 322 (2d Cir. 1974).

We have, under cautionary instructions, upheld the testimony of a witness explaining his own prior failure to testify for the Government or his prior contradictory or inconsistent statements because of fear of threatened retaliation. *United States* v. *Place*, 263 F.2d 627 (2d Cir.), *cert. denied*, 360 U.S. 920 (1959); *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971); *United States* v. *Scandifia*, 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). While these cases permit an impeached witness to explain the circumstances concerning his own state of mind, they do not extend to the explanation for the failure of a presumably favorable wit-

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1 Appellant does not on appeal contest the district court's ruling that the statement was not barred by the hearsay rule "since it was limited to bringing out the informant's state of mind" (Tr. 43-44). *Frank* v. *United States*, 220 F.2d 559, 564 (10th Cir. 1955); *Mattox* v. *News Syndicate Co.*, 176 F.2d 897, 903-904 (2d Cir.), *cert. denied*, 338 U.S. 858 (1949); see also *Case* v. *New York Central Railroad Co.*, 329 F.2d 936 (2d Cir. 1964); VII Wigmore, *Evidence* § 1790 (3d 1940).

ness to testify. A much more serious risk of prejudice exists in such a case because the witness is not present to be cross-examined, even though the testimony concerning his state of mind falls within the hearsay exception.

Vecchione, while on the stand, testified that Gerstenfeld was not in the custody of the Government, that he was not in any way under the control of the Government, that efforts to locate him were unsuccessful, and that Gerstenfeld had told Vecchione that he would never testify because "he was in fear of being killed." It was a general statement which did not point to Malizia as a potential killer and, in fact, on cross-examination Vecchione testified that Gerstenfeld never told him that he heard that Malizia was trying to kill him and further, that Gerstenfeld had worked for Vecchione in other cases prior to making the purchase from Malizia. Malizia claims that the explanation was unnecessary and that all the Government was entitled to was testimony to show that it had attempted without success to find Gerstenfeld. See *United States* v. *Young*, 463 F.2d 934, 939-40 (D.C. Cir. 1972); *Wynn* v. *United States*, 397 F.2d 621, 625 (D.C. Cir. 1967). This, however, may not be sufficient. An adverse inference is likely to arise if a party fails to call a key witness who is expected to give favorable testimony to his cause. "It would present an anomaly in the law if, while one party may comment upon the absence of an opposing party's witness, . . . the opposing party were not permitted to introduce evidence to excuse the absence of such witness." *Schumacher* v. *United States*, 216 F.2d 780, 788 (8th Cir. 1954), *cert. denied*, 348 U.S. 951 (1955). On the other hand, such testimony predicated upon fear of retaliation, is so prejudicial that it should be excluded in the absence of exceptional circumstances.

In this case Malizia had an option to exclude the testimony but he rejected that option and chose instead to exploit the absence of the witness, emphasizing upon summation that Gerstenfeld was "not here to tell you what happened." From these exceptional circumstances arose the necessity to anticipatorily rebut the claim that the Government should have produced the witness. While we believe that cautionary instructions would have been advisable in this case, we conclude that on balance defendant was treated fairly and that the admission of the prejudicial testimony was not sufficient to warrant a reversal, particularly in view of the overwhelming nature of the evidence by the seven agents who had participated in the surveillance of the sale of February 17, 1971.

Malizia next challenges the admission of the testimony of Investigator Kayner to the effect that he brought three fingerprint cards from the Federal Bureau of Narcotics, among which was Malizia's fingerprint, to the State Police Laboratory to compare with a fingerprint located on the innermost plastic bag containing the cocaine sold to the informant. Kayner testified that no prints at all had been readable from the outer two wrappings around the cocaine; that the partial print removed from the innermost plastic bag had been compared with known parts of Malizia's prints but the print on the bag was not Malizia's print. The theory of Malizia's objection is that reference to Malizia's fingerprints from the Bureau of Narcotics carried the implication that he was a narcotics violator. It is well known that the Government has in its files fingerprints of most Government officers and employees as well as those who had ever been in any branch of the military service and those who have voluntarily offered their prints. It would have been sufficient without causing any prejudice had the Government's witness simply testified that the fin-

gerprint cards had been produced from the Government files instead of the Bureau of Narcotics files. However, no card was introduced into evidence and no objection was made to the testimony which, in fact, absolved Malizia, whose counsel exploited the issue on both cross-examination and summation. *Cf. United States* v. *Schwartz*, 398 F.2d 464 (7th Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969); *United States* v. *Dichiarinte*, 385 F.2d 333, 337 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968). We find no reversible error.

II

Malizia raises three other claims of error, which are of a substantial nature. In connection with establishing proof that Malizia was a fugitive, the Government attempted to show that Malizia was aware of the fact that he was being sought for arrest by introducing evidence that on February 24, 1971 agents stopped an automobile and advised the driver, Malizia's brother John, that they were looking for Malizia. In examining Investigator Gross the prosecutor asked "What brought you to John Malizia exactly?" and he replied "Well, the night of the Operation Flanker—," and when Investigator Pinto was asked what happened on February 24 and 25 he replied that "It was an operation of the federal government called Flanker, ..." The reference to the code word "Flanker" was a passing innocuous reference and did not indicate that Malizia was the target of the operation. No objection was made to the use of the phrase and no curative instruction was sought. We find no error. See *United States* v. *Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974).

Malizia also claims error in the admission of evidence of his flight, on the ground that he was not informed personally of the charge and no evidence was introduced as to exactly when he fled. The existence of a warrant or

proof of defendant's knowledge that he is being charged with a crime is not a prerequisite to the admissibility of the evidence of flight, *United States* v. *Ayala*, 307 F.2d 574 (2d Cir. 1962), and it is also proper to establish flight by showing unsuccessful efforts by the police to locate the defendant. *United States* v. *Waldman*, 240 F.2d 449 (2d Cir. 1957); *Kanner* v. *United States*, 34 F.2d 863, 866 (7th Cir. 1929). Evidence of flight, like any other circumstantial evidence, has consistently been admissible as evidence of guilt if considered with other facts of the case. *United States* v. *Ayala*, *supra*; *United States* v. *Miles*, 468 F.2d 482 (3d Cir. 1972). The evidence here was amply sufficient to be admitted and justified Judge Motley's instructions to the jury on flight, which adequately protected Malizia's rights.

Finally, Malizia objects to the trial court's charge as being coercive. He claims that the trial judge gave what he characterizes as an improper Allen charge in the original charge to the jury. In her instructions to the jury the trial judge stated, among other things: "As we have already pointed out, I think Government counsel and defense counsel have, and I will now point it out, that this is an important case to both the Government and defendant, and therefore since it is an important case, it must be decided. You are not to single out any one instruction alone as stating the law, but you have to consider these instructions as a whole." She also stated that the jurors were not to surrender their honest convictions and that the verdict must reflect the conscientious conviction of each and everyone of them. Malizia claims that the statement that the case "must be decided" was coercive. The charge was given at 6:15 P.M. on Friday, February 15, 1974, on the eve of a holiday, and the remark was perhaps a slip better left unsaid. But it was not said after a disagreement or deadlock on the part of the jury but before sub-

mission of the case to the jury. Taken into consideration with other portions of the charge, this remark could hardly be deemed coercive. As a matter of fact, the charge as a whole was eminently fair to the defendant. See *Nick* v. *United States*, 122 F.2d 660, 674 (8th Cir.), *cert. denied*, 314 U.S. 687 (1941); *United States* v. *McNeil*, 433 F.2d 1109 (D.C. Cir. 1969); *United States* v. *Martinez*, 446 F.2d 118, 119 (2d Cir.), *cert. denied*, 404 U.S. 944 (1972).

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-440

ERNEST MALIZIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a three day jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of selling cocaine, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to ten years' imprisonment and fined $20,000. The court of appeals affirmed on September 17, 1974 (Pet. App. A). On September 22, 1974, petitioner escaped from custody, and he is presently at large. The petition for a writ of certiorari was filed on October 17, 1974, subsequent to the escape. By his unlawful escape petitioner disentitled himself "to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.